DOCUMENT RESUME

ED 161 364 HE 010 595

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TITLE	Impact of Federal Intervention on Higher Education. AIR Forum Paper 1978.
PUB DATE	May 78
NOTE	21p.; Paper presented at the annual Association for Institutional Research Forum (18th, Houston, Texas, May 21-25, 1978)
EDRS PRICE	MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS	Affirmative Action; Copyrights; *Costs; Court Litigation; Educational Finance; Equal Opportunities (Jobs); Federal Aid; Federal Legislation; *Federal Regulation; Government Role; *Government School Relationship; Handicapped Students; *Higher Education; Institutional Autonomy; Medical Schools
IDENTIFIERS	Copyright Law of 1976; Health Professions Educational Assistance Act; Rehabilitation Act 1973 (Section 504)

ABSTRACT

The issue of federal intervention facing institutions of higher education is addressed and quantitative and qualitative impacts of recent federal legislation and regulations on higher education are measured. Precepts posited in defense of federal intervention are articulated, including: financial contributions, social injustice, moral responsibility, and student unrest. The general costs of complying with federal laws and regulations are also considered, including the Health Professions Educational Assistance Act of 1976; the Copyright law of 1976; Affirmative Action and Equal Opportunity; and Section 504 of the Rehabilitation Act of 1973. Steps recently undertaken to reduce these costs are examined and additional solutions are offered. A prognosis is offered for what higher education can look forward to from the Federal government and what role it can play to protect its interest. (Author/JMD)

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THE ASSOCIATION FOR INSTITUTIONAL RESEARCH

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IMPACT OF FEDERAL INTERVENTION ON HIGHER EDUCATION

ABSTRACT

One of the most serious crises currently facing institutions of Higher Education is Federal intervention. The level which this crisis has reached is attested to by the fact that the Presidents of three leading universities (Yale, Harvard, and Cornell) have in the past two years presented major reports addressed exclusively to this concern.

In addition, Secretary of Health, Education, and Welfare, Joseph A. Califano, Jr., recently announced the launching of Operation Common Sense which he characterized as "...a comprehensive effort to review, simplify and, where possible, abbreviate HEW's massive program and administrative regulations." He commented further that: "As participants in many of the Department's program activities, you and your colleagues know at firsthand the cost in time, understanding, cooperation and effective program operations of excessively detailed, burdensome, complex, and unintelligible regulations."

The purpose of this paper is to measure the impact both quantitatively and qualitatively of recent federal legislation and regulations on Higher Education. The paper proceeds with the following modus operandi: First, it articulates the precepts posited in defense of federal intervention in Higher Education. Among these are: financial contributions, social injustice, moral responsibility, student unrest, etc.

Second, the paper enumerates the general costs of complying with Federal Laws and Regulations.

Third, the paper considers the impact of a number of recent Federal Laws and Regulations. Included are: Health Professions Educational Assistance Act of 1976; Copyright Law of 1976; Affirmative Action and Equal Opportunity; and Section 504 of the Rehabilitation Act of 1973.

Fourth, the paper examines the steps which have recently been undertaken to reduce these costs and offers additional solutions to this problem.

Finally, the paper offers a prognosis for the future of what Higher Education can look forward to from the Federal government and what role Higher Education can play to protect its interests.

Ronald H. Stein

Introduction

Stanford University was recently informed that their 6,000 chrome-plated fire extinguishers were in violation of Federal regulation -- that they be colored red. "Exasperated officials figured out a way to comply; they wrapped the offending fixtures in red tape."[1]

One of the most serious crises currently facing institutions of Higher Education today is Federal intervention. The level to which this crisis has reached is attested to by the fact that the Presidents of three leading Universities (Yale, Harvard, and Cornell), have in the past two years presented major reports addressed exclusively to this concern.

In addition, Secretary of Health, Education and Welfare, Joseph A. Califano, Jr., recently announced the launching of Operation Common Sense which he characterized as "... a comprehensive effort to review and simplify and, where possible, abbreviate HEW's massive program and administrative regulations." He further commented that: "As participants in many of the department's program activities, you and your colleagues know at first hand the costs in time, understanding, cooperation, and effective program operations of excessively detailed, burdensome, and complex, and unintelligible regulations."

[1]"Red Tape Blues," Newsweek, August 30, 1976, p. 77.

From a historical context, we find that prior to 1971 institutions of postsecondary education were relatively free from outside intervention. The general feeling at all levels of the Federal government, and one that was frequently articulated by the Federal Courts, was that they would not impose their wisdom on those who were better qualified. When the government began to become involved in the institution's affairs, they generally restricted their activities to the areas where other less drastic alternatives failed to provide relief.

Justification for Federal Intervention

What then is the explanation for the significant increase we have witnessed since 1971 in the government's activity in this area? While there is no one single answer, the explanation most commonly offered is that of the significant increase in Federal financial support. Kingman Brewster, former President of Yale, describes this philosophy as "Now that I have bought the button, I have a right to design the coat." While the essence of this aphorism may be valid it underestimates the magnitude of the financial support the Federal government actually gives to colleges and universities throughout the country. In 1976, institutions of Higher Education in the United States expended approximately 50 billion dollars.[2] That same year the Federal government provided approximately 7 billion dollars or 14% of the total expenditure. The largest single

[2]Goladay, the Condition of Education, HEW, National Center for Educational Statistics. Washington: Government Printing Office, 1976, pp. 28-29.

contribution by the Federal government was through the package of grants, work study, and loans to students. In 1976, it was estimated that HEW's Office of Education provided over 3 billion dollars in financial aid to almost two million students.[3]

It is in this light, that the Federal government feels, with some justification, that they not only have the right but also the obligation to protect the "Federal dollar."

A second area which must be considered is social justice. There is no question that colleges and universities are as guilty as other segements of American society in failing to bring qualified minorities and women into their ranks. It is equally true that there are fewer than a handful of colleges and universities whose facilities are accessible to the handicapped. Government officials remark that if these institutions would have progressed on their own to resolve these inequities, there would have been no need for government intervention.

The third area which must be recognized is the penchant our legislators have for using Federal programs as a way of legislating morality. The clearest example of this is the recent unsuccessful attempt by Senator Schweiker to amend the Senate version of the Health Professions Education Assistance Act of 1976 to deny capitation funds to any schools which deny student admission based on his belief in sterilization and abortion.

This leads to a fourth factor which must be acknowledged. Colleges and universities represent easy targets. Almost all

[3]A report of the Commission on Federal Paperwork: Education, Washington: Government Printing Office, 1977, p. 14.

receive Federal funds; therefore, it is easy to attach conditions to the funds which would affect almost every college and university in the country. Also, colleges and universities tend not to be political animals. Generally, they are perceived as passive rather than active. They do not see themselves as social forces or engaged in lobbying efforts for other than financial considerations. Also, colleges and universities are used to being regulated. Even private institutions have super structures which layer on a fair degree of external control and pressure.

Finally, the student unrest in the late 60s and early 70s brought national attention to our institutions of postsecondary education.

General Costs of Federal Programs.

The sheer additional cost which must be born by institutions to administer Federal programs is staggering. According to a study done by the American Council on Education,[4] the cost of administering 12 federally mandated social programs, including social security taxes, from the period of 1965 to 1975, at the University of Illinois at Urbana, went from $438,470 in 1965-66 to $1,205,045 in 1974-75. These costs are even more askew at Georgetown University where they went from $110,736 in 1965-66 to $3,603,243 in 1974-75. These costs affect all levels of postsecondary education. In Miami Dade Community College costs went from $1,263 in 1968-69 to $180,764 in 1974-75.

[4]Van Alstyne and Caldren, The Costs of Implementing Federally Mandated Social Programs at Colleges and Universities, American Council on Education, June 1976.

The Southern Association of Colleges and Schools reported that, based upon their survey, "...the cost of complying with Federal regulations required some institutions to spend as much as fifty cents to administer every Federal dollar received."[5] One college was reported to have spent over 2 million dollars in a single year to comply with Federal regulations. Derrick Bok, President of Harvard University, estimates that 60,000 hours of faculty and staff time were spent in 1975 to enable them to comply with Federal regulations. In a 1976 editorial critical of Federal regulations of institutions of Higher Education, Change[6] magazine estimated the cost of compliance in 1976 by all institutions of Higher Education to have reached 2 billion dollars. In essence, colleges and universities were forced to spend two dollars to comply with Federal regulations for every seven dollars they received from the Federal government. The editorial also estimates that for every one new bureaucrat added to oversee university compliance, another 150 university administrators must be hired to keep up with the increased workload.

Medical School Capitation Funds

A good illustration of the state of Federal intervention is the recent Foreign Medical Student legislation. The 1976 Congress, towards the end of its session, wrote a provision into the Health Professions Education Assistance Act of 1976 bill. The provision (known as the Guadalajara provision), was designed to respond to the problem of the vast number of qualified applicants

[5] Congressional Record, Vol. 123, No. 67, Washington: Government Printing Office, April 22, 1977, p. S6261

[6] Change, Vol. 7, No. 10, December-January 1975-76, p. 10.

versus the small number of successful admissions to the 119 medical schools in the United States. Congress decided to remedy this problem by creating a vehicle whereby American students studying abroad, who met certain standards, could reenter the mainstream of the American medical education process at the junior year. The Congress used, as a demonstration of students' ability, their successful passing of Part (I) of Med Boards. Individual schools were prohibited from barring students for failing to meet the schools' own individual admissions standards. The Secretary of HEW would determine how many medical students would be assigned to each medical school. Refusal to accept these students would subject the medical schools to the loss of their capitation funds estimated to amount to approximately $1,400 per student. Also, the Bill coupled certain student loans to the accepting of capitation funds. One saving grace of the provision was the fact that implementation was delayed until the 1978-79 academic year.

The response from the Medical Educational Community was immediate and strong. Johns Hopkins issued a statement that: "The University...is not prepared to abdicate to the government, the right to select its students, nor, for that matter, its faculty, courses of study, and degree requirements."[7] Among the medical schools which informed HEW of their refusal to comply with this Law, besides Johns Hopkins, were Harvard, St. Louis University Medical School, Yale, Stanford, UCLA. In addition, four institutions prepared a constitutional challenge to the Law.

[7] National Association of State Universities and Land-Grant Colleges, Circular Letter, No. 20, September 14, 1977, p. 6.

In November 1977, the House responded by passing an amendment to the Bill. The amendment required that the medical schools increase the size of their 3rd year classes by 6% and allow the individual schools to select what foreign school transferees would fill these slots provided they had completed two years and passed Part (1) of the Med Boards.

The Senate version repealed the Foreign transfer provision in toto.

In December 1977, a compromise was reached between the House and the Senate versions. The Bill was limited to the 1978-79 academic year. Under it the medical schools were required to increase their third year classes by 5%. They, rather than HEW, could choose the transfer students and it would not be limited to students who had passed Part (1). The Bill contained a number of other exemptions including the right to count transfers from American two-year transfer preparatory medical education schools. However, the penalty for non-compliance was increased to a loss of capitation funds not only for the academic year 1978 but also 1979-80. In the end, both the spirit and the purpose of the Bill remained. Congress had held over the heads of medical schools, the threat of loss of Federal funds to enforce a change in what was essentially a basic internal academic decision-class size.

However, the fact that 15 schools had chosen to forego the Federal carrot to protect what they felt was an attack on their academic integrity has raised a pickwickian response from the Federal government. The General Accounting Office has undertaken

an audit of 11 medical schools; 5 schools which had agreed to participate in the Transfer Program before it was amended, 4 who had refused the capitation grants, and 2 which had met the Law without adding additional spaces. The stated purpose of the study is to find alternative ways to provide Federal support to medical education. However, the legislators were disturbed by the ability of the medical schools to refuse the capitation funds. The real question may well be: Can the Federal Government build a better carrot?

Disputes over capitation funds are not limited solely to medical schools. Recently the University of Oregon, Health Sciences Center, School of Nursing decided to reject $150,000 in capitation money. In explaining what has been characterized as "one of the most difficult decisions of her professional career, Dr. Carol Linderman, Dean of the School of Nursing, stated that: "Our identification of the needs of nursing education in this state did not match up with what the Federal government required us to do if we accepted capitation money."[8]

Copyright Law of 1976.

The Copyright Act of 1976 provides still more testimony to the all pervasive nature of Federal intervention into the very fabric of the university. Clearly, the area of copyright is one of the more difficult to legislate. The Act represents 10 years of debate and negotiations motivated by a desire to provide proper remuneration from those using another person's work product. The Bill is also designed to recognize the principle of fair use so that educational use of copyrighted material may continue. The Bill had to take into account not only present technological

[8] University of Oregon Health Sciences Center News, Vol. 6, No. 9, Portland: University of Orgeon Health Sciences Center, October 1977, p. 8.

developments but also future advances. All this has resulted in the Bill which is equally confusing to lawyer, and layman alike.

From University's perspective, the regulations of the Copyright Law are almost overwhelming. Under the old Law, the university was not concerned with royalty rights. This was a matter of concern for the entertainer and student group who paid for the performance.

With the enactment of the new Copyright Law, universities now find themselves in the position of providing royalty payments for the copyright music performed on their campuses. (Exemptions are provided for "certain types of uses"). Consequently, two national education organizations, the National Association of Colleges and University Business Officers, and the American Council on Education proceeded to enter into negotiations with the 3 major music performing rights organizations (ASCAP, BMI, AND SESAC) for the purpose of developing a model license and royalty payment rate.

Where a few years ago there would have been acquiescence on the part of the university to what represents a substantial additional burden, we now find continued evidence of the revolt by higher education to government regulations. The University of Tennessee system has taken the position that it is the performer's responsibility rather than the university's to make the appropriate royalty payments. In response to the challenge that such a requirement may result in a boycott of the Tennessee system, the president of the University of Tennessee writes that: "It seems to us that the big name entertainers who have resources to pay royalties would not give up such a lucrative source of revenue

if we stand together on this issue." Sheldon E. Steinbeck, Attorney for the American Counsel on Education, recently estimated that royalty payments will cost universities and colleges approximately 1.5 million dollars annually.

Civil Rights Affirmative Action and Equal Opportunity.

As discussed earlier, the two best examples in Social Engineering by the Federal government are affirmative action and equal opportunity. The genesis of these policies stems from Congressional Laws, Executive Orders, and Federal Regulations. (Civil Rights Act of 1964, Age Discrimination, Employment Act of 1967, Equal Pay Act of 1963, Title IX Regulations of the Educational Amendments of 1972, Executive Order 11246 of 1965, amended by Executive Order 11375, 1967).

Until President Carter recently issued his Executive Order consolidating enforcement responsibilities in the Equal Employment Opportunity Commission, 18 different Federal departments and agencies were involved in policing job discrimination. This figure does not include the University and State agencies nor the Federal and State Courts which may be involved in various stages.

By now, we are well familiar with such cases as that of HEW notifying Wethersfield, Connecticut that its All-Boy Choir was in violation of Title IX unless they could demonstrate that it resulted from "requirements based on vocal range and quality."[9] But these costs of Federal regulations are easily rectified by the resultant publicity, congressional pressure, and even

[9] Buffalo Evening News, July 31, 1976.

presidential persuasion. But what have been the costs of these Federal laws, orders, and regulations to our institutions of Higher Education. In introducing Senate Bill S1361, "Academic Freedom Act of 1977," Senator Helms reported that the University of North Carolina recently filed a report weighing more than 12 pounds with the HEW Office of Civil Rights.[10] The University of Illinois estimates that equal employment and affirmative action requirements consume 64% of all monies spent to comply with Federal regulations, the University of California at Berkeley estimates that their affirmative action plan required by law, cost $400,000 to develop.[11] It has been estimated that in 1975, colleges and universities spent 6 million dollars in advertising costs alone to satisfy the affirmative action search requirements.

While much has been written on the cost of complying with Equal Opportunity Affirmative Action regulations, little has been done to estimate the cost of defending against charges of discrimination. If the State University of New York at Buffalo can be taken as a guide, the cost is equally staggering. It has been estimated that one unfinished case has already cost the University $250,000. The scenario that this case has followed through the various State and Federal agencies, as well as the courts, may be illustrative.

In 1970, the employee was informed of her non-reappointment to her faculty position. In that spring, she filed a grievance with an ad hoc internal grievance committee. That committee

[10] Congressional Record, Vol. 123, No. 67, Washington: Government Printing Office, April 22, 1977, p. S6261.

[11] Ibid, p. S6264.

ruled against the grievant and she subsequently appealed to another internal committee of the University who sustained the earlier finding.

In July 1970, the faculty member filed a complaint with the New York State Division of Human Rights. In 1971, a Hearing was held and a decision was rendered in favor of the University. This decision was appealed to the New York State Commissioner of Human Rights who in late 1971 affirmed the decision. The Commissioner's decision in turn was appealed to the Human Rights Appeal Board, who in 1973 unanimously affirmed the Commissioner's decision. The faculty member then filed an appeal with the Appelate Division 4th Department of the New York State Supreme Court. In late 1973, they affirmed the Commissioner's decision. Following this decision, the faculty member requested reinstatement which was denied. She then filed a complaint with the Equal Employment Opportunity Commission in 1973,

In late 1975, EEOC made a finding of reasonable cause against the University. This allowed the faculty member to bring suit in the U.S. District Court for the Western District of New York which she did in 1976.

In October 1977, the New York State Attorney General's Office motion for summary judgment was dismissed by that court. Presently, the Attorney General is appealing that decision to the U.S. Court of Appeals. Finally, while the appeal was pending, in June 1977, HEW's Office of Civil Rights informed the University that they were interested in reopening the 1973 EEOC case. The University informed them that since this matter was currently in Federal Court that such a request would be inappropriate. The Office of Civil Rights concurred and suspended their investigation.

Other campuses throughout the country have indicated that they have had similar experiences to that undergone by the State University of New York at Buffalo.

The proliferation of government adjudication processing has raised serious questions, by experts in the field, of the value of administrative proceedings. A number of these experts are so bold as to assert that the basic values of the administrative proceeding no longer exist; therefore, these administrative adjudication processes should be eliminated in favor of direct access to both State and Federal Courts. These basic values are: first, a speedy resolution of the dispute; second, a just finding based upon facts in a non-adversarial setting; and third, the matter is decided once and for all. The experience at Buffalo plus experiences at other colleges and universities of a similar nature quickly demonstrate the invalidity of the first tenet. The plethora of bodies before which one can continue hearings results in the ability of a complainant to maintain a complaint almost indefinitely. Attorneys feel that to have brought this case through the judicial system, even with its levels of appeals, would have taken far less time. The second tenet is based upon the fact that just resolution is the standard; therefore, complicated rules of evidence are not necessary in administrative proceedings. The lack of the rules of evidence have, in fact, mitigated against the very nature of the administrative proceeding. Attorneys argue endlessly over minute and often trivial points of procedure, with the merits of the case becoming a secondary concern. Clear rules of evidence provide the framework necessary to allow the proceeding to move on to arguments of substance.

The failure of the third tenet probably represents the biggest complaint by critics of administrative proceedings. Experience has shown that by allowing a de novo review before each new agency cases are not resolved quickly and in some instances are not resolved at all.

What is the consequence of all this? A general feeling by those who participate in these proceedings is that they represent essentially a tremendous waste of time and energy of all people involved. They create false hopes in the minds of complainants that the matter can be resolved quickly, that they can get their rights affirmed and get back to some stability in their everyday life. Institutions have learned to live in an atmosphere of fear. They know that just about every decision they make affecting a person's employment will be appealed through these lengthy and involved procedures. They feel that there is no disincentive to discourage an individual from doing otherwise. This represents a substantial financial cost to the institution and to government.

Finally, the government's procedures in various agencies have been looked upon as a farce. Critics point to interagency squabbling, such as the recent dispute between the Office of Civil Rights and the Department of Labor.

Section 504 of the Rehabilitation Act of 1973.

Section 504 of the Rehabilitation Act of 1973 and the accompanying HEW Regulations were signed into law on June 3, 1977. The basic premise of this Act is to provide access by the handicapped to educational opportunity. The Law and its accompanying Regulations were designed to be implemented in two phases. First, by August 2,

1977, institutions of Higher Education were required to make such modifications as necessary, except structural, to make their programs accessible to the handicapped. Second, and the most difficult phase, requires that by June 3, 1980 institutions of postsecondary education are obligated to make their facilities accessible by making the appropriate structural modification. Programmatic accessibility, although the easier of the two phases for institutions to implement, is not without its costs. I am sure you are aware of the case of Converse College in South Carolina, where the college was ordered to provide an interpreter service to a deaf student. The student's tuition for the two courses in which she was enrolled was $410 while it was estimated that the interpreter's services were expected to cost the college $750. In the judge's order, he captured the sense commonly felt by critics of the government's action in these areas. "The judge said...he was 'entirely sympathetic' to the thrust of law, but that, if the federal government in all its widsom, decides that money should be spent to provide opportunities for a particular group of people, that government should be willing to spend its own money (i.e., our taxes) for such purposes and not require that private educational institutions use their limited funds for such purposes."[12]

However, it is the facility accessibility phase which has brought gray hair to campus planners, construction fund administrators, and budget officers. At the time the law was enacted, an

[12]The Chronicle of Higher Education, Vol. XIV, No. 21, August 1, 1977, p. 13.

environmental impact statement by the Office of Civil Rights estimated that it would cost colleges and universities 61 million dollars for handicapped renovations as required by the regulations. However, Mr. Thomas Burgum, Deputy Counsel for the Senate Appropriations Committee, has estimated the actual cost of compliance with Section 504 to be between one billion to one and a half billion dollars. This cost is staggering when we note that the entire budget for higher education in 1978 was approximately 7 billion dollars.

Solutions.

Clearly, approaches such as President Carter's recent Executive Order consolidating the enforcement procedure for job discrimination in the Equal Employment Opportunity Commission is a move in the right direction. Also, requiring impact studies before issuing regulations in order to determine the financial costs, and simplifying regulations is a demonstration of further progress.

Simply reducing the sheer amount of paperwork, colleges and universities must generate every year to satisfy government reporting procedures, can also represent a substantial savings. The implementing recommendation of the Commission on Federal Paperwork simplifying the 'triparte' student financial aid application represented a savings to the State University of New York at Buffalo from $3,520 in 1976 to $765 in 1977. Similar savings could be realized by implementing the other recommendations of the Commission in areas such as contracts and compliance surveys.

All these changes have, and will, help. However, only one solution really exists for relieving the awesome burden which these Federal Laws and Regulations have placed on the financial resources of colleges and universities. The Federal government must be willing to assume part of these costs.

Many of these Federal programs which institutions of post-secondary education are being forced to comply with were originally drafted for industry. Examples of this can be seen in the application to higher education of laws such as the Occupational Safety and Health Act of 1970 and Regulations of the Environmental Protection Agency. While industry is able to pass these increased costs to its consumers, the Federal government fails to recognize that the universities lack the same ability. Presently, throughout the country, Higher Education is facing one of its gravest financial crises. Institutions being labor intensive markets have only two options to meet the costs of these federally mandated programs -- the first to raise tuition, and the second, to reduce staff. Confronted with the rapid increase in tuition, which was necessitated by the rapid rate of inflation during leveling off or even declining enrollment, tuition increases will soon reach the point of diminishing returns. Therefore, the only avenue open to these institutions will be to reduce their academic program and cut back on faculty and staff. Which means, given the principle of last hired, first fired, women and minorities, who were the last to enter the job market, will be the first to be retrenched. Therefore, these Federal regulations have created dilemma whereby the cost of complying with them will be exacted from the very people they are designed

to assist; consequently, the only solution is for the Federal government to provide financial resources to assist the colleges and universities in conforming with these regulations.

Future Directions.

As we have seen, some progress in reducing the cost of complying with Federal regulations is being made. Hopefully, as more colleges and universities cry "foul," progress in the direction of further cost reductions will continue to be made.

However, it is not an exaggeration to say that colleges and universities throughout the country are beginning to rebel against excessive and costly Federal laws and regulations. Every year more universities are seriously considering and, in fact, refusing Federal monies because of their concomitant control. In addition, colleges and universities are no longer hesitant to take the Federal government to court to protect and uphold what they feel are their basic rights. While it appears that the Executive and Congressional Branches of Government will continue to legislate and regulate, colleges and universities will be watching their action very carefully. Colleges and universities are beginning to measure laws and regulations by whether they achieve a balance between the notion of autonomy and accountability. It is up to colleges and universities to ensure that the "regulators are regulated."